Jurisdictional Statement

81-1310

FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

ANTHONY RAGNO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal From The Fourth District Court of Appeals of the State of Florida

JURISDICTIONAL STATEMENT

CHARLES L. JAFFEE
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QUESTIONS PRESENTED BY THE APPEAL

I.

IS FLORIDA'S DRUG TRAFFICKING LAW, WHICH UPON CONVICTION IMPOSES MANDATORY MINIMUM SENTENCES WITHOUT PAROLE, AND PERMITS SENTENCE REDUCTION ONLY IF THE DEFENDANT "PROVIDES SUBSTANTIAL ASSISTANCE IN THE IDENTIFICATION, ARREST, OR CONVICTION OF ANY OF HIS ACCOMPLICES, ACCESSORIES, CONSPIRATORS, OR PRINCIPALS", UNCONSTITUTIONAL AS A VIOLATION OF THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION.

II.

IS FLORIDA'S DRUG TRAFFICKING LAW, WHICH UPON CONVICTION REQUIRES A COURT TO IMPOSE A MANDATORY MINIMUM SENTENCE WITHOUT PAROLE UNLESS THE PROSECUTOR IN HIS UNREVIEWABLE DISCRETION, MOVES FOR A SENTENCE REDUCTION, UNCONSTITUTIONAL AS A VIOLATION OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

III.

IS THE FLORIDA DRUG TRAFFICKING LAW, WHICH UPON CONVICTION REQUIRES A COURT TO IMPOSE A MANDATORY MINIMUM SENTENCE WITHOUT PAROLE UNCONSTITUTIONAL AS A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

IV.

IS THE FLORIDA DRUG TRAFFICKING LAW, WHICH UPON CONVICTION FOR POSSESSION OF VARIOUS CONTROLLED SUBSTANCES REQUIRES A COURT TO IMPOSE A MANDATORY MINIMUM SENTENCE WITHOUT PAROLE; AND THE LENGTH OF THE SENTENCE IS DEPENDENT UPON THE QUANTITY OF THE CONTROLLED SUBSTANCE SEIZED WITHOUT ANY REGARD FOR THE PURITY OF THE SUBSTANCE, UNREASONABLE, ARBITRARY, AND CAPRICIOUS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

V.

IS STATUTORY PROVISION PROVIDING MITIGATION FROM MANDATORY MINIMUM SENTENCES FOR THOSE DEFENDANTS WHO PROVIDE POLICE AND PROSECUTION WITH "SUBSTANTIAL ASSISTANCE" VAGUE AND INDEFINITE.

VI.

DOES FLORIDA'S MITIGATION PROVISION OF ITS DRUG TRAFFICKING LAW DENY EQUAL PROTECTION TO THOSE DEFENDANTS WHO CANNOT PROVIDE "SUBSTANTIAL ASSISTANCE".

PARTIES

Of the parties in the lower court, only two, the State of Florida and Anthony Ragno, are parties in this Court.

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STATUTES AND CONSTITUTIONS

ARTICLE 5, §3(b)(3), FLORIDA CONSTITUTION. 1

§893.135, Florida Statutes. 1, 3-6, 7

STATEMENT OF JURISDICTION

This is an appeal from the Fourth District Court of Appeal of the State of Florida. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(2) as the Fourth District Court of Appeal is the highest court in Florida in which a decision could be had on this case. Additionally, appellant Anthony Ragno is alleging that the Florida Drug Trafficking law is repugnant to various clauses of the U.S. Constitution and the Fourth District Court of Appeals upheld the statute's validity.

The date of entry of judgment in this case was September 16, 1981 when the Fourth District Court of Appeal in a Per Curiam opinion reversed the trial court's ruling on the authority of *State v. Benitez*, 395 So.2d 514 (Fla. 1981), which was the Florida Supreme Court decision which upheld the constitutionality of the drug trafficking statute.

On October 14, 1981, appellant Ragno's motion for a rehearing was denied. On December 18, 1981 a notice of appeal was filed in the Fourth District Court of Appeal.

The District Court of Appeal's decision could not be appealed to the Florida Supreme Court because the Florida Supreme Court lacked jurisdiction to hear the appeal. Article 5, §3(b)(3) of the Florida Constitution is the section that gives the Florida Supreme Court jurisdiction to review decisions of the Courts of Appeals.

Section 3(b)(3) reads:

> May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The Florida Supreme Court has held that per curiam, affirmed decisions are not cases which expressly set forth a decision. *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980); *Dodi Publishing Company v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980); *Thurston v. State*, 385 So.2d 1370 (Fla. 1980); *Robles Del Mar Inc. v. Town of Indian River Shores*, 385 So.2d 1371 (Fla. 1980); *St. Paul Title Insurance Corp. v. Davis*, 392 So.2d 1305 (1980), *reh den.* (1981). Similarly, where the Fourth District Court of Appeal in this case has reversed per curiam relying on a previously decided Florida Supreme Court case, they have not *expressly* declared valid a state statute.

Because the Florida Supreme Court lacks jurisdiction to hear the appeal, the Fourth District Court of Appeal is the highest state court in which a decision could be had in this case.

THE STATUTE WHICH IS BEING CHALLENGED AS UNCONSTITUTIONAL IN THIS APPEAL IS FLORIDA STATUTE 893.135

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences

(1) Except as authorized in this chapter or in chapter 500 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or

more of cocaine as described in s. 893.03(2)(a)4. or of any mixture containing cocaine is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(d) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b[1]), is guilty of a felony of the first degree, which felony shall be known as "trafficking in phencyclidine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(e) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 200 grams or

more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(2)(c), is guilty of a felony of the first degree, which felony shall be known as "trafficking in methaqualone." If the quantity involved:

1. Is 200 grams or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 25 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon

STATEMENT OF THE CASE

On June 3, 1980, the appellant, ANTHONY RAGNO and five other Defendants, RALPH ANTHONY MONCAU, TIMOTHY WILLIAM ARDAGNO, ANTHONY JOHN D'AMORE, MARTIN GEORGE VENER and MARK STEVEN TRINA were charged in an information with trafficking in cocaine contrary to F.S. 893.135(1)(b)(3), F.S. 893.03(2)(a)(4) and F.S. 893.13(1)(a)(1). On or about July 23, 1980, Defendants ARDAGNO and TRINA filed a motion to dismiss the information filed against them claiming that F.S. 893.135 was unconstitutional. On or about July 25, 1981, Appellant RAGNO filed a similar motion.

On or about August 15, 1980 a hearing was held on the motions to dismiss. Because the court had previously ruled the statute unconstitutional, no evidence was introduced nor any arguments made during the hearing. Rather, the court orally announced he would issue an order declaring the statute unconstitutional and thus granting the Defendants' Motions to dismiss. Attached to the court's order was a copy of a similar order he had issued in a previous case which more fully spelled out the court's reasoning.

The state then took an appeal to the Fourth District Court of Appeal. Since the Supreme Court of Florida was at that time considering the constitutionality of §893.135 in *State v. Benitez, supra*, the appeal of this case was stayed pending the decision in *Benitez*. On February 12, 1981 the Florida Supreme Court upheld the constitutionality of the statute and on September 16, 1981, the Fourth District Court of Appeals reversed the decision of the lower court.

There are compelling reasons why plenary consideration should be given to this case. Foremost is the onerous nature of this statute. Appellant Ragno faces fifteen years in jail for allegedly possessing one kilogram of cocaine. Ragno and others like him deserve to have the U.S. Supreme Court determine whether F.S. 893.135 is constitutional. Moreover, the arguments put forth as to the unconstitutionality of the statute are certainly not frivolous. The trial court judge in this case concluded that the statute was unconstitutional and he has been joined by many trial judges in reaching that conclusion. The Supreme Court of Florida's decision in *Benitez* was far from a thorough analysis of the statute and such an analysis should be made by this Court.

Respectfully submitted,

CHARLES L. JAFFEE

CHARLES L. JAFFEE
3363 Sheridan St., #210
Hollywood, Fl. 33021

Appendix

I

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT
JULY TERM 1981

CASE NO. 80-1491.

STATE OF FLORIDA,

Appellant,

v.

TIMOTHY WILLIAM ARDAGNO,
ANTHONY RAGNO and MARK
STEVEN TRINA, a/k/a
MARK STEVEN TRAINA,

Appellees.

Opinion filed September 16, 1981

Appeal from the Circuit Court for Broward County; Stanton S. Kaplan, Judge.

Jim Smith, Attorney General, Tallahassee, and Stewart J. Bellus, Assistant Attorney General, West Palm Beach, for appellant.

D. Robert Silber, Ft. Lauderdale, for appellees-Ardagno and Trina.

Charles L. Jaffee, Ft. Lauderdale, for appellee-Ragno.

PER CURIAM.

Reversed on the authority of *State v. Benitez*, 395 So.2d 514 (Fla. 1981) and remanded for further proceedings.

REVERSED AND REMANDED.

MOORE, HERSEY and HURLEY, JJ., concur.

II

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

Case No.: 80-4778CF-B&F

Judge; Kaplan

STATE OF FLORIDA,

Plaintiff,

vs.

RALPH ANTHONY MONCAU a/k/a RALPH ANTHONY MONCAN, *TIMOTHY WILLIAM ARDAGNO,* ANTHONY JOHN D'AMORE, ANTHONY RAGNO, MARTIN GEORGE VENER, *MARK STEVEN TRINA,* a/k/a *MARK STEVEN TRAINA,*

Defendants.

ORDER DECLARING F.S. 893.135, RELATING TO TRAFFICKING IN CONTROLLED SUBSTANCES UNCONSTITUTIONAL

THIS CAUSE coming on to be heard upon the Defendants' Motion to Dismiss the Information pending against them, and the Court having heard argument of counsel, and the Court being otherwise fully advised in the premises, thereof,

IT IS HEREBY, ORDERED AND ADJUDGED that F.S. 893.135 (Trafficking in Cocaine) is declared invalid and unconstitutional on the grounds previously stated by this Court in Broward Circuit Court Case Number 79-4954CF, *State of Florida vs. Russell Leicht*, a copy of said Order is attached to this Order and incorporated herein.

IT IS FURTHER ORDERED AND ADJUDGED that the all of the Defendants' said Motion to Dismiss the Information who have filed same in the above-styled cause is hereby granted.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, ths 15 day of August, 1980.

/s/ [Copy Illegible]
Judge, Circuit Court

Filed In Open Court,
ROBERT E. LOCKWOOD,
CLERK
ON 8/15/80
BY /s/ C. Anderson

Copies furnished:

D. Robert Silber, Esq.
B. F. Walsh, Asst. Public Defender
Alan S. Ross, Esq.
Charles L. Jaffee, Esq.
David Damore, Esq.
State Attorney's Office

IN THE CIRCUIT COURT IN AND FOR
THE SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

CASE NO. 79-4954CF

JUDGE KAPLAN

STATE OF FLORIDA,

Plaintiff,

vs.

RUSSELL LEICHT,

Defendant.

ORDER DECLARING FLORIDA STATUTE 893.135, RELATING TO TRAFFICKING IN CONTROLLED SUBSTANCES UNCONSTITUTIONAL

THIS CAUSE came to be heard upon the Defendant's Motion to Declare Florida Statute 893.135 unconstitutional. The Court having considered the Motion, the legal memoranda of Counsel for both sides, and having reviewed the case authorities presented the Court, hereupon finds that Subsection 3 of the Statute is unconstitutional for the reasons to be expressed. The Court further finds that a voiding of Subsection 3 voids the entire Statute because the Sections of the Statute are so interdependent that the Legislature would not have passed one without the other.

Subsection 3 provides:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

A person is entitled to invoke his privilege against self-incrimination where his words might furnish a single link in a chain of evidence connecting him to the commission of a crime. *Malloy v. Hogan*, 78 U.S. 1 (1964).

The United States Supreme Court has concluded that no person may be penalized for asserting his privilege against self-incrimination. Thus, the Court has nullified the ouster of a public school teacher, *Slochower v. Board of Education*, 350 U.S. 351 (1956); has repudiated the disbarrment of an attorney, *Spevak v. Klein*, 385 U.S. 511 (1967); has revoked the suspension of a police officer, *Garrity v. New Jersey*, 385 U.S. 493 (1967); has overruled the removal from office of a public official, *Perla v. New York*, 392 U.S. 296 (1968); *Lefkowitz v. Cunningham*, 421 U.S. 801 (1977); has rescinded the discharge of public employees where individuals were

disciplined merely because they invoked their privilege against self-incrimination, *Uniformed Sanitation Mens Association Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968); has forbidden the elimination of a contractor's right to do business with the state, *Turley v. Lefkowitz*, 414 U.S. 70 (1974).

In the Federal system judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant, and have expressly stated that these factors will determine the sentence to be imposed. These sentences have been vacated as unconstitutionally coercive.

In *Thomas v. United States*, 368 F.2d 941 (5 CA 1966) the trial court indicated that if the defendant would come clean and confess his guilt at sentencing, the court would take that into account in the length of the sentence to be imposed. Likewise, the court indicated, if the defendant persisted in his denial of wrongdoing, the court would take that into account. In vacating the sentence, the court held when the defendant received harsher punishment than the court would have decreed had he waived his right against self-incrimination, he paid an imposed penalty for exercising his constitutionally guaranteed right.

In *United States v. Rodriguez*, 498 F.2d 302 (5 CA 1974) the trial court stated it would have compassion on those defendants who confessed guilt, and would deal more harshly with those who remained silent. The court in reversing emphatically stated that a defendant retains important Fifth Amendment Rights after a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant

in the dilemma of either abandoning his right against self-incrimination or risking a higher sentence.

In *United States v. Rogers*, 504 F2.d 1079 (5 CA 1974) in sentencing the defendant, the court stated the first step towards rehabilitation was to cooperate with the authorities in bringing others involved in the conspiracy to justice, and unless and until he indicated "substantial, material, productive cooperation" mitigation would not be forthcoming, reversing, the Court reasoned that in implicating his accomplices, accessories and co-conspirators he was admitting his own complicity. Therefore, the defendant was again faced with the dilemma of abandoning his right against self-incrimination, or foregoing a reduction or suspension of his sentence.

In *United States v. Garcia*, 544 F2.d 681 (3 CA 1976) the trial court predicated leniency on the defendants assisting the government in reducing drug trafficking and there was no guarantee that if such information were forthcoming the defendants would not be subsequently indicted. The Court found the defendants were faced with a Hobson's choice: remain silent and lose the opportunity of leniency, or speak and run the risk of additional prosecution. The Court declared the price tag of waiving the protection of the Fifth Amendment was too high and vacated the sentence.

Subsection 3 requires as a condition precedent to leniency, the defendant waiving his right against self-incrimination. "Substantial assistance" is defined as providing testimony which will lead to the identification, arrest, or conviction of a defendant's accomplices, access co-conspirators or principals. The very nature of the testimony sought requires a defendant to incriminate

himself. Otherwise, they would not be *his* co-conspirators. The cooperating defendant who comes forward in good faith has no guarantee the testimony he gives will not form the basis for a future prosecution.

As stated in *Rodriquez* supra, a defendant retains important Fifth Amendment Rights after a verdict. During the pendency of an appeal, a defendant retains his right against self-incrimination. Should a cooperative defendant have his case reversed and remanded for a new trial, the Statute is silent as to whether he will be immunized for the testimony he provided, or whether that testimony may be used against him at his new trial.

Subsection 3 clearly places the defendant in the dilemma of either abandoning his privilege against self-incrimination, or being penalized by a higher sentence. sentencing court for mitigation. The Statute does not specifically state that a defendant may petition the court for mitigation. It is a general principle of statutory interpretation (i.e. expressio unius est exclusio alterius) that the expression of one thing implies the exclusion of another. The wording of the Statute excludes the defendant from petitioning for mitigation.

The transcript of the hearing before the Florida House of Representatives, Committee on Criminal Justice reveals:

Mr. Chairman:

> ". . . If they do not cooperate, if the State Attorney does not petition, it is mandatory . . . on the judge. He can only be relieved by petition from the state attorney." (TR pge. 7)

Representative Martinez:

> ". . . the state attorney has to be convinced that it's substantial and the state attorney has to file the petition, and the defendant doesn't have anything . . . His attorney can't come up and say hey court . . . that's all the man knows; He's out of the picture. It's just the state attorney and the law enforcement." (TR pge. 9-10)

Mr. White (drafter of the Bill):

> ". . . I would hesitate in turning this substantial assistance into an adversary proceeding." (TR pge. 22-23)

> "If you had it so that the defense attorney could file the motion, then he could initiate the proceedings that would be before the court without the state attorney ever passing on the substantial nature of the information . . ." (TR pge. 29)

At the Committee hearing, Representative Martinez attempted to amend the Bill to provide "standing" to the defendant to petition for mitigation. However, this was defeated. (TR pge. 40-43).

The transcript of the hearing on the Bill before the Florida Senate reveals the Bill shall provide that the state attorney may move for mitigation. (TR pge. 4)

The transcript of the hearing on the Bill before the Florida House of Representatives reveals:

". . . I thought of amending so that (the defendant) will also be allowed to petition the court . . . let's not even give him that chance . . ." (TR pge. 5)

Representative Martinez attempted to amend the Bill on the floor to give the defendant "standing" to petition for mitigation. The amendment was defeated.

As reflected in the aforementioned comments, the Legislature intended that only the state attorney should have "standing" to file the mitigation petition, and that the hearing would be non-adversary.

Generally, defendants have the right to initiate such proceedings (Fla.R.Crim.P.3.800). This Statute precludes the person with the paramount interest in the outcome of the proceeding from initiating the action, or even being heard if a hearing is held.

The threshold determination of whether mitigation will be sought is solely in the discretion of the prosecutor. Once they cooperate, defendants have a vested interest in the proceedings. It is essential they be able to have the question of what constitutes "substantial assistance" litigated before a neutral magistrate.

Accordingly, the Court finds Subsection 3 denies the defendant access to the courts, and abridges his rights to due process of law as guaranteed by the United States and Florida Constitutions.

The Court recognizes that a statute may contain constitutional and unconstitutional sections, and that a partial invalidity of a statute does not necessarily render

the entire statute void. This Statute provides for severability. However, the Court finds the mere inclusion of a severability clause is not dispositive of the issue.

The transscript of the hearing before the House of Representatives Committee on Criminal Justice reveals:

Representative Haben:

> "I am still opposed to mandatory minimum sentencing . . . I felt obligated to come down and explain to you why I'm supporting this particular measure." (TR pge. 3)
>
> ". . . I think this is not a pure mandatory minimum. It is . . . if you are caught . . . convicted . . . and chose not to aid and assist law enforcement." (TR pge4)
>
> ". . . he's not going to spend 15 years in Raiford he's going to turn state's evidence. So I think because of the fact that there is a way out, it is not a pure mandatory minimum . . ." (TR pge 4)

Mr. Gibson (Counsel to the Governor):

> "It . . . gives us a new tool . . . When the reality of (the penalty) sets in . . . you want to cooperate . . ." (TR pge 35)

The transcript of the hearing before the Florida Senate Committee reveals:

Senator Spicola:

> "Then the whole incentive, the whole object of the Bill to make him cooperate . . ." (TR pge. 24)

Senator Steinberg:

> "If these people feel they're not going to get out for a period of time . . . (then they'll cooperate). That is what the Bill does." (TR pge. 30)

The transcript of the hearing on the Bill on the floor of the Senate reveals:

> "The reason for the Bill is to make the penalty stiff enough that . . . when he hears that door slam . . . for 3 to 25 years, (he's going to cooperate)." (TR pge. 4)

The transcript of the hearing on the Bill on the floor of the House reveals:

> ". . . the real thrust of this thing is to try and make sure . . . the prosecution has enough of a hammer over a person's head to make them talk." (TR pge. 4)

Based on the foregoing, the Court finds the mandatory minimum sentence provisions and the mitigation provision are so interdependent that the Legislature would not have passed one without the other. It is clear that the purpose of the mandatory minimum sentences was to give law enforcement officials leverage to force cooperation.

WHEREFORE, the Court finds that Florida Statute 893.135 is unconstitutional.

DONE AND ORDERED at Fort Lauderdale, Florida this 6 day of November, 1979.

/s/ Stanton S. Kaplan
STANTON S. KAPLAN
CIRCUIT COURT JUDGE

Copies furnished:
Jeffry Driscoll, Asst. State Attorney
H. Dohn Williams, Esquire

III

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 80-1491

STATE OF FLORIDA

Appellant,

v.

TIMOTHY WILLIAM ARDAGNO,
ANTHONY RAGNO, et al.,

Appellee.

October 14, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee, Anthony Ragno's September 24, 1981 Motion for Rehearing is denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Debbie [Copy Illegible]
for CLYDE L. HEATH,
CLERK

cc: Attorney General
Charles L. Jaffee, Esq.
D. Robert Silber, Esq.

cms

IV

[RECEIVED '81 DEC 18]

IN THE DISTRICT COURT OF APPEAL
OF THE FOURTH DISTRICT OF FLORIDA

CASE NO. 80-1491

STATE OF FLORIDA,

Plaintiff, Appellant

v.

ANTHONY RAGNO,

Defendant, Appellee

NOTICE OF APPEAL

NOTICE IS GIVEN that ANTHONY RAGNO, appeals to the United States Supreme Court from the decision of this Court entered in the above captioned proceeding on September 16, 1981 and for which a Motion for Rehearing was denied on October 14, 1981. This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Charles L. Jaffee
CHARLES L. JAFFEE
Counsel for Anthony Ragno
3363 Sheridan St., #210
Hollywood, Florida 33021
(305) 963-0601

AFFIDAVIT OF SERVICE

STATE OF FLORIDA

COUNTY OF BROWARD

Before me personally appeared CHARLES L. JAFFEE, who being duly sworn stated the following:

That one copy of this Notice of Appeal has been mailed this 15th day of November, 1981 by depositing an addressed envelope into a United States Mailbox to each of the following parties: Attorney General of the State of Florida, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401 and D. Robert Silber, attorney for appellees TIMOTHY WILLIAM ARDAGNO and MARK STEVEN TRINA, 510 S.E. 17th St., Fort Lauderdale, Florida 33316.

/s/ Charles L. Jaffee
CHARLES L. JAFFEE

/s/ [Copy Illegible]
NOTARY PUBLIC

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAR. 26 1982
BONDED THRU GENERAL INS. UNDERWRITERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Jurisdictional Statement have been mailed to the Appellee, the Attorney General of the State of Florida, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401 and D. Robert Silber, attorney for TIMOTHY WILLIAM ARDAGNO and MARK STEVEN TRINA, 510 S.E. 17th St., Fort Lauderdale, Fl. 33316, who were co-defendants in the trial court.

CHARLES L. JAFFEE

CHARLES L. JAFFEE

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
APR 6 1982
ALEXANDER L. STEVAS
CLERK

81-1310

CASE NO. [redacted]

IN THE
Supreme Court of the United States
October Term, 1981

ANTHONY RAGNO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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QUESTION PRESENTED

Whether Section 893.135, Florida Statutes is unconstitutional in that it is violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and cruel and unusual punishment.

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PREFACE

The Appellant was the defendant in the Florida trial court and the Appellee in the Fourth District Court of Appeal below. The State of Florida was the prosecution in the trial court and the Appellant in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appeared in the trial court below.

The following reference is made in this brief:

(A) For the Appendix to the brief of the Appellant.

I

OPINIONS BELOW

The opinion of the Florida Fourth District Court of Appeal reversing the trial court's finding that Section 893.135 Florida Statutes is unconstitutional is reported at State v. Ardango, 403 So.2d 1097 (Fla. 4th DCA 1981). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendant claims jurisdiction herein based upon 28 U.S.C. 1357(2).

III

ARGUMENT

The State is in receipt of the Defendant's jurisdictional statement on appeal from the Fourth District Court of Appeal of Florida, in which the court reversed the trial court's finding that Section 893.135 Florida Statutes is unconstitutional, citing State v. Benitez, 395 So.2d 514 (Fla. 1981); See, also, State v. Thebeau, 405 So.2d 973 (Fla. 1981); State v. Newman, 405 So.2d 971 (Fla. 1981); State v. Leicht, 402 So.2d 1153 (Fla. 1981); State v. Werner, 402 So.2d 386 (Fla. 1981); State v. Yu, 400 So.2d 762 (Fla. 1981). The Defendant now seeks a second review in this Court. The Defendant claims that the mandatory penalties under Section 893.135(1) and the provision for mitigation in Section 893.135(1) in the event of a defendant's "substantial assistance" are violative

of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and unusual punishment.

A. NON-FINALITY

The present appeal evolves from a circumstance wherein the Florida trial court declared Section 893.135 Florida Statutes unconstitutional in a criminal trial proceeding and thereupon dismissed the charge against the Defendant. The Florida Fourth District Court of Appeal reversed the dismissal and thereby re-instated the charges against the Defendant. There has been neither a trial on the merits nor a conviction of the Defendant. Section 1257(2) of 28 U.S.C. limits the jurisdiction of this Court to. "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . "Where there is neither a trial on the merits nor a conviction and sentence, this Court has no jurisdiction and the cause should be dismissed. See, Flynt v. Ohio, ____

U.S.____, 101 SoCt. 1958 (1981); see, also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). The present cause is identical to that presented in Wall v. Florida, U.S.Sup.Ct.Case No. 81-782, appeal dismissed January 11, 1982, appeal dismissed January 11, 1982 and Blalock v. Florida, U.S.Sup.Ct.Case No. 81-712, appeal dismissed January 11, 1982.

B. THE DEFENDANTS HAVE NO STANDING

In the leading decision in State v. Benitez, 395 So.2d 514 (Fla. 1981) upon which this appeal is based, the State had argued that the Defendants had no standing to argue the constitutionality of Section 893.135 Florida Statutes, because the statute was a sentencing statute and the Defendants had not even presented motions to supress and neither had they been convicted. In rejecting this argument the Florida Supreme Court explained that:

> "The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty oriented statute.
>
> To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal state in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. See State v. Millington, 77 So.2d 685 (Fla. 1979); State v. Champe, 373 So.2d 874 (Fla. 1978)." [Emphasis added].
>
> 395 So.2d at 517.

Recently, in County Court of Ulster County, New York v. Allen, ____U.S.____, 99 S.Ct. 2213 (1979), the defendant/petitioner upon a due process claim had sought to overturn New York Penal Law §265.16(3), which provides that the presence of a firearm in a vehicle is presumptive of its possession by the occupants. 99 S.Ct. at 2217. The United States Court of Appeal for the Second Circuit had held that the statute was, "unconstitutional on its face." 568 F.2d 998 at 1009. In reversing the Circuit Court of Appeals, the Allen Court again emphasized that:

"A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. That justification, of course, has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons." (Emphasis added, citations omitted).

99 S.Ct. at 2223.

See, California Bankers Association v. Shulty, 416 U.S. 21, at 71-72 (1974). The Allen Court went on to consider the facts and circumstances before it and found that the New York Statute constitutional as applied. 99 S.Ct. at 2226-2230. The sine qua non of any factial attack upon the constitutionality of a statute as in the case at bar, is a requirement that the statute may be violative of the fundamental rights contained in the First Amendment. County Court of Ulster v. Allen, supra; Broaderick v.

Oklahoma, 413 U.S. 601, at 611-612 (1973).

The Defendant's complaints and the fundamental premise of Section 893.135(1) is directed to the sentencing proceedings and thereafter. The Defendant has not been convicted or sentenced. Given the multiplicity of protections afforded the Defendant in the criminal justice system, including plea bargaining; motion practice and the right to a trial by jury, the Defendant may never be convicted or sentenced for an offense under Section 893.135. Merely because he has challenged the constitutionality of the statute does not render the issue fundamental and properly susceptible to judicial analysis. County Court of Ulster v. Allen, supra. Sub judice, the Defendant's constitutional conplaints are inherently premature and devoid of proper standing. Absent any issue regarding freedon of speech,

the facial attach upon the constitutional-validity of Section 893.135, must necessarily be rejected. Id.

In sum, the Florida Supreme Court in Benitez has improperly conferred jurisdiction upon this Court by its incorrect analysis of the Defendant's standing and the ripeness of the present claims for adjudication. This Court should accept jurisdiction in order to correct this serious and repetitive error in the Supreme Court of Florida's constitutional analysis. To do otherwise will only encourage further needless, premature litigation such as that presently before the Court. See, Point "A", supra.

C. NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendant's constitutional complaints are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United States, ____U.S.____, 100 S.Ct. 1958 (1980) the defendant, a heroin dealer, refused to cooperate with police in further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a more severe sentence than if the defendant had cooperated. Id. In sustaining the more severe sentence the Roberts court held, 1) that part of the defendant's rehabilitation would be cooperation with law-enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As in Roberts, in the case at bar there is

not a shred of evidence that the Defendant has been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibitation, the testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunningham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See, United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether a Defendant has a difficult choice but whether he has a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendant only with a difficult choice

and is therefore not in violation of any constitutional precepts.

The Defendant's claims that Section 893.135 denies due process and the statute imposes cruel and unusual punishment are similarly wholly without merit. In Bordenkircher v. Hayes, 434 US. 357 (1978) the prosecutor in pretrial plea bargaining had told the defendant, the defendant's plea to a term of five years in prision would be acceptable, but that if the defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the defendant as an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id at 360. In framing the issue, the Bordenkircher court spedifically held that:

"As a practical matter, in short, this case would be no different if the grand jury had indicated Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." [Emphasis added].

Id.

Addressing the principles which are clearly controlling herein, the court further opined that:

"By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv.L. Rev. 564 (1977). Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct. at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible--attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Emphasis added].

Id, at 364.

Relying upon its decision in Bordenkircher, in Corbitt v. New Jersey, ____U.S.____, 99 S.Ct. 492 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 99 S.Ct. at 495. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discretion of the trial court. 99 S.Ct. at 495-497. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term under the statute. 99 S.Ct. at 495-496.

In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth and Fourteenth Amendments, the Corbitt court held that:

"As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only "the possibility or certainty. . . .[of] a lesser penalty than the sentence that could be imposed, after a trial and a verdict of guilty. . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463, 1470, 25 L.Ed.2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher thus:

"While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable '--and permissible--' attribute of any legitimate system which tolerates and encourages the negotiation

of pleas.' Chaffin v. Stynchocombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." 434 U.S., at 364, 98 S.Ct., at 668."

99 S.Ct. at 498.

In the case at bar, after his convictions, sentences and appeals, the Defendant has two choices under the statute. He may either serve the lawful term of his imprisonment or he may seek the benefit of mitigation of his sentences by substantial cooperation with the authorities. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing the Defendant with the choice of "grim alternatives" upon his convictions for trafficking in narcotics in Florida.

Trafficking in narcotics is indeed a heinous crime, which is tearing at the

very fabric of our society. Clearly the legislative purpose in providing more severe penalties for such a crime has a rational basis and therefore is manifesting devoid of any defect under an equal protection claim. See, analysis in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also, Albernaz v. United States, ____U.S.____, 101 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, ____ U.S.____, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court may intrude. Id.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below and/or dismissing the Defendant's appeals.

RESPECTFULLY SUBMITTED, on this 25th day of March, 1982, at Tallahassee, Leon County, Florida.

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